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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-176

FRANK A. HALL,
PETITIONER,

v.

JAMES DiMARZO, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LEE CARL BROMBERG
Special Assistant Attorney General
ROBERT H. CLARIDGE
Counsel
Massachusetts Department of Correction
100 Cambridge Street
Boston, Massachusetts
Tel. (617) 727-3324

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Opinions Below

The opinion of the court of appeals (Appendix A), *DiMarzo* v. *Cahill*, was issued on May 2, 1978, amended on May 19, 1978, and is reported at 575 F.2d 15 (1st Cir. 1978). The order and opinion of the district court (Appendix B), issued July 8, 1977, are not reported.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether when a state enacts a statute requiring the state Commissioner of Correction to promulgate and enforce minimum standards for county correctional facilities, which the state Commissioner does not operate, administer, or control, the state Commissioner thereby becomes liable under 42 U.S.C. § 1983 for any and all unconstitutional conditions and practices that may exist in the county facilities.

2. Whether merely because sentenced prisoners are given a certain amount of out-of-cell time, detainees are constitutionally required to receive the same.

Statement of the Case

A. *Prior Proceedings*

This action was commenced by two inmates at the Essex County Jail and House of Correction in Salem, Massachusetts. An amended complaint was filed on behalf of three sentenced inmates and one pre-trial detainee seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and also alleging violations of state law. Following a hearing on May 11, 1977, and a personal view of the facility two days later, the district court issued an injunction and memorandum. Appendix B. Although the court's order was entitled a "Preliminary Injunction", the court indicated that the prior hearing on the preliminary injunction was being consolidated with the hearing on the merits.

The defendant Sheriff and Deputy Master as well as the petitioner, the Massachusetts Commissioner of Correction, appealed to the First Circuit, at the same time commencing implementation of the district court's order.

The court of appeals affirmed the district court's order.

Judge Levin A. Campbell filed a separate concurring opinion.

There is presently no stay of the injunction.

B. *Facts*

The subject of this litigation is the Essex County Jail and House of Correction at Salem, Massachusetts (hereafter "Essex") which was constructed in 1815 with an addition in 1884. Essex, which presently houses approximately one hundred and ten male inmates (including about twenty-five pre-trial detainees), has no plumbing in the cells.

Plaintiffs filed a lengthy complaint in April, 1977, principally challenging the lack of plumbing and consequent indignities, but also raising many other issues including fire safety and the fact that pre-trial detainees were locked in their cells for longer hours than the sentenced inmates. They named as defendants the Sheriff of Essex County, the Sheriff's "Deputy Master" (the chief executive officer of the facility), the three Essex County Commissioners, and the petitioner, who is the state Commissioner of Correction.

The Massachusetts General Laws distinguish between "state correctional facilities", which are "owned, operated, administered or subject to the control of" the state Department of Correction and "county correctional facilities", which are "owned, operated, administered or subject to the control of a county of the commonwealth". M.G.L. c. 125, § 1(f),(n). (A-25, 26)[1] Each county in Massachusetts is required to provide "suitable" jails and houses of correction, both of which are "county correctional facilities". M.G.L. c. 34, § 3; c. 125, § 1(d), (f). (A-25, 31) The county

[1] All cited state statutes have been included in Appendix C. Numbers preceded by the letter "A" refer to pages in the Appendices.

commissioners have sole authority to construct and repair county correctional facilities as well as broad powers and responsibilities in governing their operations. M.G.L. c. 34, § 14; c. 126, §§ 1, 2, 11. (A-29-32) The sheriff of the county has direct charge of the jails and houses of correction and has custody and responsibility for the inmates committed to those facilities. M.G.L. c. 126, § 16. (A-30, 31)

In 1972, a statute was enacted requiring the state Commissioner to promulgate minimum standards for county correctional facilities and to enforce those standards, if necessary, by petitioning state courts for appropriate orders. M.G.L. c. 124, § 1(d), (q); M.G.L. c. 127, §§ 1A, 1B. (A-27-29, 32-34) This did not alter the situation that funding and management of county institutions comes from the county. *Inmates of Suffolk County Jail* v. *Eisenstadt*, 494 F.2d 1196, 1199 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974).

The complaint in the case at bar charged that the Commissioner had failed to meet his statutory obligation to promulgate minimum standards, to inspect Essex semi-annually to determine compliance, and to take steps to enforce his standards. Citing *Rizzo* v. *Goode*, 423 U.S. 362 (1976), the Commissioner moved to dismiss on the ground that the complaint failed to state a federal claim against him upon which relief could be granted. In response, plaintiffs argued that if the Commissioner had met his statutory obligations, "the unconstitutional conditions alleged to exist at Salem would have been corrected or at least ameliorated". Although the Commissioner thereafter lent his expertise and staff time to the district court's effort to work out a settlement which would upgrade conditions at Essex, he nevertheless maintained that his relatively remote supervisory responsibilities and his inability to control funding, management or personnel at Essex exonerated him from constitutional liability and its attendant

consequences under the principles established in the *Rizzo* case.

The district court issued its injunction on July 8, 1977 without ruling on the Commissioner's motion to dismiss. In its opinion, also dated July 8, 1977, the court found that the construction of Essex is such that extension of water and sewer lines to each cell would not be feasible. (A-19) The court ordered the installation of three flush toilets and sinks at the site of existing water and sewer connections. (A-19)

Having personally viewed the Essex facility, the district court found a serious fire hazard requiring the following improvements which the court ordered: regularly held fire drills; an increase in staff for fire prevention, detection and evacuation; the installation of an electronic cell-locking system, electronic smoke detectors, an additional standpipe with hoses, fire retardant and non-toxic mattresses, and emergency air packs; the application of flame retardant paint to the floors; the cutting of an additional exit door; and the replacement of wooden stairs with non-combustible material. (A-13-15, 21-22)

Finding that pre-trial detainees are allowed out of their cells ten and one-half hours three days a week, seven and one-half hours for the alternating three days, and fifteen hours on Sunday, the court stated that, in its view, even the greatest amount of daily lock-in for Essex detainees (approximately sixteen hours) was "not unreasonable"[2] and was "considerably more generous" than the lock-in held to be excessive in other cases. (A-21) Nevertheless, the court ordered a staff increase "to permit out-of-cell time for detainees, who are not special security risks, which is substantially equivalent to the out-of-cell time permitted inmates of the House of Correction", whom the court found

[2] The court stated, ". . . if they are in 16, they are out eight hours. It seems to me that is not unreasonable". Transcript of "Continued Hearing", June 20, 1977, p. 2-10.

to be receiving fifteen hours of daily out-of-cell time. (A-13, 20) The court's basis for this order was that a detainee has a fourteenth amendment right to be "treated at least no worse than convicts who are housed in the same institution". (A-23)

The court's order stipulated that the facility would have to be closed if the mandated changes were not accomplished. (A-13) The order also provided, however, that the more substantial renovations would be deemed waived if the county commissioners determined to build a new jail and house of correction and if a construction contract were actually executed. (A-15, 16) The Essex County Commissioners have since decided not to build a new facility. (A-9)

The Commissioner of Correction continued to lend expertise and substantial staff time to help the Essex defendants to come into compliance with the district court's order, but he also pressed an appeal to exonerate himself from the charge that he was responsible for subjecting Essex inmates to constitutional deprivations, and to avoid the anomalous proposition that he was liable for any unconstitutional conditions and practices that may exist at Essex and the other county facilities in Massachusetts even though he has no control over their personnel or their fiscal affairs. However, the court of appeals rejected the Commissioner's reliance upon the *Rizzo* case and held that because he is required to promulgate and enforce minimum standards in the county correctional facilities, he can be held liable for any unconstitutional conditions and practices that may continue to exist in those institutions. (A-3-6)

In affirming the order to equalize out-of-cell time, the court of appeals held that officials had not "articulated any constitutionally sufficient reason for withholding out-of-cell privileges to pretrial detainees substantially equivalent to those provided the convicts at Essex." (A-11) Judge Campbell indicated his disagreement with the majority's invocation of this standard:

> . . . I wish to make it clear that I would not agree that merely because sentenced prisoners are given a certain amount of out-of-cell time, detainees are constitutionally required to receive the same. A mechanistic approach to constitutional analysis seems to me inappropriate. *See generally Feeley* v. *Sampson*, 570 F.2d 364 (1st Cir. 1978).[3] There are plausible reasons why a short-term detainee might reasonably be subjected to greater limitations than those imposed upon a regular inmate. Some regular inmates, like those serving short sentences for misdemeanors, are not security risks. Detainees, on the other hand, are likely to be recidivists or persons charged with serious crimes. Furthermore, long term sentenced prisoners are more obviously entitled to opportunities for exercise and recreation than persons being held for a few days or weeks. (A-12)

Considerations similar to those cited by Judge Campbell had been articulated by the county defendants as reasons for the differential in out-of-cell time. Deputy Master *Warren Bethune* had testified that pre-trial men, who are incarcerated in lieu of making bail, generally face more serious charges than those of which House of Correction men have been convicted, and that the sentenced men stay longer at Essex and can be involved in programs. Counsel for the sheriff and deputy master had stated that "if

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[3] In *Feeley* v. *Sampson*, the First Circuit rejected the "strict scrutiny" approach to reviewing conditions of pre-trial detention, under which officials carry a burden of justifying every restriction imposed upon a detainee on the basis of "compelling interest" and must further demonstrate that each measure taken is the "least restrictive alternative". *Supra*, 570 F.2d at 370-1. The *Feeley* Court also rejected any presumptive rule that it is unconstitutional to treat a detainee less well in any particular than a sentenced inmate. *Id.* at 371.

there was more staffing, if there was more room, if there was more facilities", the sheriff would be willing to provide some more out-of-cell time. Counsel had cautioned, however, that the pre-trial population presented a much more serious security problem than the House of Correction inmates.

Reasons for Granting the Writ

Introduction

The decision of the court of appeals should be reviewed by this Court because it directly conflicts with *Rizzo* v. *Goode*, 423 U.S. 362 (1976), and because of the great need for clarity on the important question of supervisory liability under 42 U.S.C. § 1983.

Moreover, both of the issues presented by this petition raise significant questions concerning the proper role of the federal courts in state and local affairs. The court of appeals ruling with respect to the Commissioner's constitutional liability leaves him in the untenable position of being liable for all conditions in the county facilities while having direct control over none of them. As a practical matter, if allowed to stand, this holding will force a restructuring of existing relationships between state and county correctional authorities, either by outright state take-over of local facilities or by eliminating any ameliorative role for the state commissioner. Similarly, the court's decision with respect to detainees will have an intrusive and unwarranted impact on local correctional administration by requiring federal court intercession whenever pre-trial detainees are not receiving the same privileges as sentenced inmates.

I. The Opinion of the First Circuit Court of Appeals Is in Conflict With This Court's Decision in *Rizzo* v. *Goode*.

The court of appeals held the Massachusetts Commissioner of Correction liable on the same theory rejected by this Court in *Rizzo* v. *Goode*. This theory has it that an official with supervisory responsibilities violates the Civil Rights Act of 1871 (42 U.S.C. § 1983) when he fails to prevent or eliminate constitutional violations by subordinates. Indeed, in this case, the court of appeals stretched this theory of supervisory responsibility to an extreme by holding the Commissioner liable for conditions in a facility operated by elected officials who are not even his subordinates, but merely subject to remote guidance under his regulatory authority.

Rather than subject plaintiffs' complaint to the rigorous liability analysis which *Rizzo* v. *Goode* demands, the court of appeals essentially limited the applicability of *Rizzo* to the facts of that case. The court's characterization of *Rizzo* as involving "sporadic incidents" over which the supervisory defendants "might properly claim to have no knowledge or control" (A-5) fails to distinguish *Rizzo*. Neither lack of knowledge nor lack of control was the basis for exonerating the supervisory defendants in *Rizzo*; rather, it was the absence of any plan or policy by the defendants showing their authorization or approval of the constitutional violations. *Supra* at 371, 375. *Accord, Lewis* v. *Hyland*, 554 F.2d 93, 98-101 (3rd Cir. 1977), *cert. denied*, 98 S. Ct. 419 (1977).

The court's principal basis for holding the Commissioner liable notwithstanding *Rizzo* v. *Goode* is the fact that the Commissioner has statutory duties with respect to the

county facilities.[4] Echoing its pre-*Rizzo* v. *Goode* opinion in *Inmates of Suffolk County Jail* v. *Eisenstadt, supra,* the court observed that the Commissioner "has statutory responsibility over precisely the conditions giving rise to the [constitutional] violations." (A-5) While this rationale might have sufficed for finding liability prior to *Rizzo* (See *Eisenstadt, supra,* 494 F.2d at 1199), it does not serve to distinguish this case from *Rizzo* where the defendant police commissioner also had major state law responsibilities with respect to police misconduct, the issue in that case. Likewise, the court of appeals' specific reference to the Commissioner's duty to promulgate and enforce minimum standards fails to distinguish *Rizzo* inasmuch as the majority opinion in *Rizzo* gives no indication that a state

[4] The court of appeals, at 575 F.2d 17 (A-4), erroneously cited M.G.L. c. 124, § 1(a) for the proposition that "the Commissioner of Correction has supervisory responsibility for all state correctional facilities. . . ." The court, as indicated by the very next clause in the opinion [i.e., ". . . and is charged with promulgating minimum standards for the care and custody of persons committed to those facilities. Mass. Gen. Laws ch. 127 § 1A." (which statute (A-32) refers only to county facilities)], included county facilities such as Essex within the term "state correctional facilities." The current § 1(a), as opposed to the pre-1972 version which gave the Commissioner "general supervision of jails and houses of correction", provides only that the Commissioner shall:

> (a) designate, establish, maintain and administer such state correctional facilities as he deems necessary, and may discontinue the use of such state correctional facilities as he deems appropriate for such action; provided that no state or county correctional facility named in paragraph (n) of section one of chapter 125 shall be discontinued without specific authorization and approval of the General Court. (A-26)

Since, as noted above, the Massachusetts General Laws distinguish between "state correctional facilities" and "county correctional facilities," the court's citation of the current Chapter 124, § 1(a) for the proposition that the Commissioner has supervisory responsibility for the latter as well as the former, was plainly in error.

Parenthetically, the one reference to county facilities in chapter 124, § 1(a), *supra,* is a dead letter, as there are no county correctional facilities named in paragraph (n) of section one of chapter 125.

statute requiring the Philadelphia Mayor and Police Chief to prevent police misconduct would have produced a different result. Indeed, Justice Blackmun's dissenting opinion states that the Philadelphia supervisory defendants in *Rizzo were* under a statutory duty to supervise their subordinates. *Supra* at 386.

In circumventing this Court's holding in *Rizzo* v. *Goode,* the court of appeals arrived at a limitless notion of the Commissioner's liability. Under the court of appeals' theory of § 1983 liability by reason of state statutory supervisory responsibility, there is no reason why a state commissioner of correction would not be liable the day a "minimum standards" statute is passed, a time when no one can even argue that he has "subjected or caused to be subjected" county prisoners to violations of their constitutional rights. Moreover, the court of appeals decision makes the Commissioner liable for *all* unconstitutional conditions and practices in the county facilities. Judge Bownes' majority opinion reasoned that minimum standards "means, at the very least, constitutional" standards and that if the Commissioner had fulfilled his obligation to promulgate and enforce minimum standards, "there would exist no constitutional grievances". (A-5) By this reasoning, any constitutional condition or practice in a county correctional facility is automatically attributable to the state Commissioner, even without proof of any fault on his part. If a constitutional grievance exists, plainly, the Commissioner has not succeeded in eliminating it. And if he has not eliminated it, on the court's theory, he is liable for it. Similarly, the majority's speculative assertion that a "natural consequence" of the Commissioner's failure "to promulgate and enforce minimum standards is that conditions would fall below a constitutionally allowable limit" (A-6) suggests no limits to the Commissioner's liability.

The Commissioner submits that it would not be inconsistent with *Rizzo* v. *Goode* to hold county officials liable for constitutional violations at Essex. As the governors of the county, the county commissioners make the countless day-to-day funding and management decisions resulting in the continued use of the antiquated Salem facility. Assuming *arguendo* that there are unconstitutional conditions at Essex, the county commissioners may be held accountable on the theory that they had a policy of subjecting inmates to those conditions. Likewise, the defendant sheriff and deputy master may properly be sued for any of their administrative practices. However, it conflicts with *Rizzo* v. *Goode* to hold, as did the court of appeals, that the state Commissioner is liable because he has not eliminated the unconstitutional conditions that others have caused.

The holding of the First Circuit in *DiMarzo* forces state and local officials to adopt the fallacy of the excluded middle in the structuring of their correctional system. They must either have a centralized, state-run and state-financed system which foregoes the potential benefits of local control and local financing of local detention and short-term facilities, or they must have two independent systems, one for state convicts, the other for short-term convicts and detainees, with the latter unable to rely upon the former for guidance on minimum standards. Any middle ground solution, such as the present Massachusetts arrangement which seeks to retain the benefits of local autonomy while providing state expertise, technical assistance, and oversight, will place the state commissioner in the untenable posture of being held liable for constitutional defects in county facilities without sufficient power, short of a complete take-over, to remedy them. This is precisely the type of unwarranted intrusion by the federal judiciary in the way a state allocates responsibility among its political units that the ruling

in *Rizzo* v. *Goode* was designed to prevent. Liability must be predicated upon causation, not upon a vague supervisory role unrelated to the specific injury in question.

II. Additional Guidance Is Needed in the Wake of *Rizzo* v. *Goode*.

As Justice Marshall has recently stated, "[c]ertainly the lower courts have not found in *Rizzo* any unambiguous signal; to the contrary, they have given the opinion varying interpretations that suggest the need for guidance from this Court." Justices Marshall and Brennan, dissenting from denial of certiorari in *Lewis* v. *Hyland*, 98 S. Ct. 419 (1977). *See also* cases cited at footnote 1 of Justice Marshall's opinion, and *compare* the court of appeals liability holding in the case at bar with *Kostka* v. *Hogg*, 560 F.2d 37, 40 n.2 (1st Cir. 1977). The great need for certainty on the frequently litigated issue of supervisory liability under § 1983 and the lack of consensus as to the meaning of *Rizzo* v. *Goode* are additional compelling reasons for granting certiorari in this case.

Post-*Rizzo* v. *Goode* cases raising the specific issue of state correctional officials' liability for constitutional violations in county facilities are symptomatic of the current confusion. Each of the four cases (counting the present one) of which petitioner is aware articulates a different theory for holding the state officials liable. *DiMarzo* v. *Cahill*, ("[T]here would exist no constitutional grievances if the Commissioner were in conformity with his statutory duties") (A-5); *Miller* v. *Carson*, 563 F.2d 757, 760 n.7 (5th Cir. 1977), ("[W]hen a state official's violation of state law causes the imposition of cruel and unusual punishment, a federal cause of action arises under § 1983."); *Lucas* v. *Wasser*, 425 F. Supp. 955, 962 (S.D.N.Y. 1976) (a case where the state officials' powers and duties with respect to

the county facilities were much greater than petitioner's), ("[T]here is a direct causal link between the injury plaintiffs allege and the State defendants whose duties directly affect the conditions to which plaintiffs are subjected."); *Adams* v. *Mathis*, — F. Supp. — (M.D.Ala., 74-70-S, 2/28/78), (The State, through its responsible agencies, has a duty under the fourteenth amendment to ensure that "persons incarcerated by virtue of its laws" are not deprived of their rights.)

Petitioner submits that no purpose would be served by denying certiorari to allow continued percolation in the lower federal courts, inasmuch as the passage of two years since *Rizzo* has already produced considerable disarray on the important question of supervisory liability under the Civil Rights Act of 1871.

III. The Court of Appeals Decision Raises an Important Constitutional Question as to Whether Conditions of Pre-Trial Detention, Which on Their Face Are Not Cruel and Unusual, Punitive, or Even Unreasonable, Are Nevertheless Subject to Judicial Review and Correction Whenever They Are Shown To Be Less Advantageous Than Those for Sentenced Inmates at the Same Institution.

The point which divided the judges of the court of appeals in this case is one which urgently needs resolution by this Court.[5] The majority held that officials had not articulated

[5] The Commissioner would retain a strong personal interest in this Court's review of this question of detainees' rights even assuming the Court granted certiorari and ultimately ordered dismissal of the § 1983 claim as against the Commissioner. Plaintiffs had alleged that the Commissioner violated state law (by failing to promulgate and enforce minimum standards) and the court of appeals opinion holds, among other things, that state law requires the Commissioner to promulgate standards which not only do not violate the Constitution, but which expound whatever the Constitution requires. ["[T]here would exist no constitutional grievances if the Commissioner were in conformity with his statutory duties, *viz.*, to promulgate and enforce minimum (which, of necessity means, at the very least, constitutional) standards." 575 F.2d at 17. (A-5)]

On May 11, 1978, after a lengthy and difficult process of research, consultation, drafting, redrafting, public hearings, and revision, the Commissioner promulgated minimum "Standards for County Correctional Facilities". 103 CMR 900-999. These standards do not require that detainees be given as much out-of-cell time as sentenced inmates or require the counties to articulate "constitutionally sufficient" reasons for any differential in the time allowed out. Given the First Circuit's pronouncement on Massachusetts law, *supra*, a dismissal of the federal claim against the Commissioner would surely be followed by plaintiffs' arguing in the district court that the Commissioner's minimum standards violate state law because they do not include the equalization of out-of-cell time required by the lower courts as a matter of constitutional law. Therefore, the Commissioner would remain interested in this Court's consideration of the detainees' rights issue regardless of the outcome with respect to the *Rizzo* v. *Goode* liability point.

"any constitutionally sufficient reason for withholding out-of-cell privileges to pretrial detainees substantially equivalent to those provided the convicts at Essex". (A-11) Judge Campbell disagreed with this approach, considering it to be inappropriately "mechanistic". In Judge Campbell's view, detainees might legitimately be subjected to greater limitations than sentenced inmates because:

> Some regular inmates, like those serving short sentences for misdemeanors, are not security risks. Detainees, on the other hand, are likely to be recidivists or persons charged with serious crimes. Furthermore, long-term sentenced prisoners are more obviously entitled to opportunities for exercise and recreation than persons being held for a few days or weeks. (A-12)

Reasons very similar to these were articulated by the county officials and found by the majority to be constitutionally insufficient.

The conflicting approaches followed by the judges of the court of appeals would have very different consequences in terms of the extent of judicial review, on the one hand, and the ability of correctional officials to innovate, on the other. The majority's holding means that a pre-trial detainee may challenge any of the conditions of his confinement, even those which are obviously humane and enlightened, on the sole ground that sentenced inmates are having it somewhat better.[6] Since it may be assumed that the situation at Essex, where county jail detainees are incarcerated alongside lightly sentenced inmates who pose less serious security problems, is present in county facilities across the country, widespread application of the standard adopted by the majority would tend to generate a flood of litigation by detainees living under reasonable conditions. Such litigation would fritter away judicial resources on innumerable trivial issues and would excessively involve the courts in local correctional administration. Another unfortunate consequence of this standard is that it may well discourage

[6] Neither *Rhem* v. *Malcolm* [507 F.2d 333 (2d Cir. 1974)] nor *Inmates of Suffolk County Jail* v. *Eisenstadt* [360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir. 1974), *cert. denied*, 419 U.S. 977 (1974)], two cases frequently cited for the proposition that detainees cannot be treated worse than convicts [*See, e.g.*, Coffin, C.J., dissenting in *Feeley* v. *Sampson, supra*, 570 F.2d at 379] actually went as far as the court of appeals did here. In both cases, a broad range of conditions for detainees was compared with conditions generally prevailing for convicted prisoners and found to be "significantly inferior" (*Rhem* at 336, 338) or "grossly inferior" (*Eisenstadt* at 688). Based on these comparisons, the Second Circuit concluded that the detainees at the Tombs were being denied equal protection of the law while Judge Garrity in the *Eisenstadt* case held that detainees were being punished. *Rhem* at 338; *Eisenstadt* at 686, 687.

Notwithstanding that both these cases embraced the "strict scrutiny" analysis subsequently rejected by the First Circuit in *Feeley* v. *Sampson, supra*, neither went so far as the First Circuit here in holding that detainees' out-of-cell time had to be increased because, although the current amount was reasonable in the eyes of the district court, it was a few hours less than afforded inmates serving short sentences.

county officials from providing rehabilitative opportunities for sentenced prisoners for fear of rendering themselves liable to Civil Rights Act suits by pre-trial inmates demanding the same privileges. The concurring judge's theory, in contrast, would limit judicial review of pre-trial detention to those conditions and practices which on their face appear to be punitive or unreasonable.

Given the lack of resolution on this important question, as demonstrated by the split in the First Circuit, as well as the serious negative consequences that would result from general application of the majority's standard, petitioner submits that certiorari should be granted on this issue.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE CARL BROMBERG
Special Assistant Attorney General
ROBERT H. CLARIDGE
Counsel
Massachusetts Department of Correction
100 Cambridge Street
Boston, Massachusetts
Tel. (617) 727-3324

July, 1978

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1416 and 77-1417.

JAMES DiMARZO ET AL.,
PLAINTIFFS-APPELLEES,
v.
FRANK A. HALL,
DEFENDANT-APPELLANT.

JAMES DiMARZO ET AL.,
PLAINTIFFS-APPELLEES,
v.
ROBERT E. CAHILL,
DEFENDANT-APPELLANT.

Argued Jan. 5, 1978.
Decided May 2, 1978.
As Amended May 19, 1978.

Robert H. Claridge, Counsel, Dept. of Correction, Boston, Mass., and *John N. Nestor*, Lynn, Mass., with whom *Lee Carl Bromberg*, Special Asst. Atty. Gen., Boston, Mass., was on brief, for defendant-appellant.

Alvin J. Bronstein, Boston, Mass., with whom *Susan E. T. Studlien* and *Earnest Winsor*, Boston, Mass., were on brief, for plaintiffs-appellees.

Before
COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
BOWNES, *Circuit Judge*.

BOWNES, *Circuit Judge.*

Commissioner of Correction Hall and Essex County Sheriff Cahill appeal from an order by the district court mandating certain changes in the Essex County Jail and House of Correction (hereafter "Essex"). Sheriff Cahill filed no brief in support of his appeal; he was represented at oral argument where his counsel stated that the sheriff's position was ministerial only and that he has tried to comply with the court order to the extent within his power. The Essex County Commissioners, who have not appealed from the district court order, control the purse strings, not the sheriff. The Commissioners, we were informed at oral argument, have appropriated funds to effectuate the changes for which they are responsible. Our opinion is addressed primarily to points raised in defendant Hall's brief.

Essex, constructed in 1815 with an addition in 1884, houses approximately eighty-five prisoners in the House of Correction and approximately twenty-five pretrial detainees in the Jail. Plaintiffs-inmates brought suit under 42 U.S.C. § 1983 alleging numerous unconstitutional conditions and practices.

The district court found conditions at Essex to fall below constitutional minimum requirements. After viewing Essex, he ordered specific improvements relating to fire prevention and protection, health, recreation, and sanitation.

The court found the most pressing problem to be the fire hazard. The structure is divided into four tiers; the only exits from the cells are through the central stairwell at one end of the building and from the floor level into the exercise yard. The floors of the catwalks are tongue and groove pine, covered with several layers of old paint and, in some cases, flammable floor covering. The cells must be unlocked individually. The two fire hoses on the stairwell would be totally ineffectual if there were either fire or extensive

smoke in the stairwell. The cells are equipped with mattresses which are composed either of flammable ticking or of a foam which exudes highly toxic gas when ignited.

There is only one flush toilet for the approximately 130 inmates. No plumbing at all exists in the cells. Inmates are provided a plastic pail for excrement, a water pitcher and a plastic basin. Absence of privacy when one is engaged in personal functions is only one of the results of this system.

There are only two sets of shower stalls, each with three shower heads. The court found that existing facilities would permit the installation of at least three more enclosed flush toilets and sinks. This would help alleviate the difficulties presented by the present plumbing arrangements. The trial judge found that inmates were not always issued the required ptiche, basin, towel, sheets, and blankets upon admission.

Kitchen screens were found to be filthy and storage of food did not always comport with health requirements concerning separation of food and cleaning materials. Many of the windows in the cell area were without glass, being covered instead with dirty screens or dirty plastic sheeting which was frequently torn. Such conditions drastically reduce the amount of sunshine in the cells.

Prisoners are allotted fifteen hours per day out-of-cell time; pretrial detainees are permitted ten and one-half hours per day for three days a week, seven and one-half hours for the alternating three days, and fifteen hours on Sunday.

The district court directed that certain changes be implemented to bring Essex within constitutional bounds.

I.

Defendant Hall moves us to strike him as a party defendant because, he claims, he cannot be held responsible for denying plaintiffs their constitutional rights. The Com-

missioner construes too narrowly his statutory duties. *See Inmates of Suffolk County Jail* v. *Eisenstadt*, 494 F.2d 1196, 1199 (1st Cir.), *cert. denied*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974). Under Massachusetts law, the Commissioner of Correction has supervisory responsibility for all state correctional facilities, Mass. Gen. Laws ch. 124 § 1(a), and is charged with promulgating minimum standards for the care and custody of persons committed to those facilities. Mass. Gen. Laws ch. 127 § 1A. Should he find any facility in violation of those minimum standards, he is instructed to seek compliance by resort to the specific statutory enforcement procedures of Mass. Gen. Laws ch. 127 § 1B (set out in the margin below[1]). Mass. Gen. Laws ch. 124 § 1(d). As Commissioner, he has an express duty to establish rules and regulations relating to sanitation, safety, recreation, classification, care and custody of the persons committed to the correctional facilities. Mass. Gen Laws ch. 124 § 1(q). Plaintiffs have alleged that, by failing

[1] Mass. Gen. Laws ch. 127 § 1B. *Inspection of county correctional facilities; compliance with minimum standards; report; notice of violations; enforcement procedure*

At least once each six months the commissioner or his delegate shall inspect each county correctional facility to determine compliance with minimum standards. . .

If, in the opinion of the commissioner, any county correctional facility does not comply with the standards established by him for county correctional facilities, the commissioner shall give notice of the alleged violation to the sheriff and the county commissioners of the county in which such facility is located . . . . Said notice shall specify the particular standards that in the commissioner's opinion have not been met by such facility. The officials so notified shall have the right to be heard by the commissioner with regard to the alleged violation and shall have a reasonable period of time to remedy any such violation. If, in the opinion of the commissioner, the facility has not been brought into compliance with the aforesaid standards within a reasonable period of time from the date when notice of their violation is given, the commissioner may petition the Superior Court in equity in the county in which such facility is located for an order to close the facility or for other appropriate relief. The Superior Court shall have jurisdiction to enter such an order.

to promulgate and enforce proper statutory standards, defendant Hall caused them to suffer the unconstitutional conditions of which they complain.

Defendant Hall argues, relying on *Rizzo* v. *Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), that there is an insufficient causal link between the constitutional violations and any action or inaction on his part. He argues that his mandate is only to promulgate standards and inspect the facility and that his failure to do so does not have constitutional implications. He cannot so easily elude his mandate. Surely, if the Commissioner had promulgated standards which fell below a constitutionally permissible level, there can be no serious dispute but that this would constitute the establishment of a policy or practice open to attack by plaintiffs. *Cf. Rizzo* v. *Goode, supra*, 423 U.S. at 371, 96 S.Ct. 598. Conversely, there would exist no constitutional grievances if the Commissioner were in conformity with his statutory duties, *viz.*, to promulgate and enforce minimum (which of necessity means, at the very least, constitutional) standards. We are faced with a situation where the Commissioner of Correction has statutory responsibility over precisely the conditions giving rise to the violations. We are not confronted with sporadic incidents, over which the Commissioner might properly claim to have no knowledge or control.[2] Rather, we are dealing with the pervasive failure of responsible authorities to maintain Essex in conformity with constitutional requisites. The

[2] Other courts which have found supervisory personnel in positions such as defendant Hall's proper party defendants, *post Rizzo* v. *Goode* include: *Miller* v. *Carson*, 563 F.2d 757 (5th Cir. 1977); *Welsch* v. *Likins*, 550 F.2d 1122, 1131 (8th Cir. 1977); *Illinois Migrants Council* v. *Pilliod*, 540 F.2d 1062, 1065 (7th Cir. 1976), *modified on other grounds*, 548 F.2d 715 (7th Cir. 1977); *Sims* v. *Adams*, 537 F.2d 829, 831-833 (5th Cir. 1976); *Santiago* v. *City of Philadelphia*, 435 F.Supp. 136, 150-155 (D. Pa. 1977). *Cf. United States ex rel. Wolfish et al.* v. *Levi*, Nos. 77-2035 and 77-2135, 573 F.2d 118 (2d Cir. Jan. 24, 1978).

causal nexus between Hall's acts or failure to act and the constitutional infirmities is clear.[3]

A natural consequence of Hall's failure to comply with his statutory duties to promulgate and enforce minimum standards is that conditions would fall below a constitutionally allowable limit. We emphasize what is implicit in the foregoing analysis, *i.e.*, that Hall is a proper defendant because of his *own* statutory duty and subsequent failure to act (and the consequent constitutional injury) and not on the basis of the act of others. We thus do not face the issue of whether it is proper to predicate liability under section 1983 on the basis of respondeat superior. *Cf. Kostka* v. *Hogg*, 560 F.2d 37, 40 n. 1 (1st Cir. 1977).

II.

Defendant Hall next urges us to hold that there is no live case or controversy because plaintiffs lack standing to sue. The basis for this assertion lies in defendant's view of the nature of the injury which plaintiffs must sustain for their allegations to rise to the status of an actual case or controversy. The requisites for standing were capsulized in *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). A party must allege "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." *See also Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976);

[3] As Mr. Justice Douglas pointed out after a thorough historical exegesis, the Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action. *Monroe* v. *Pape*, 365 U.S. 167, 180, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). *See also Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153 (1977). Failure to act where there is a duty to act can give rise to an actionable claim under section 1983.

Rizzo v. *Goode*, *supra*; *Warth* v. *Seldin*, 422 U.S. 490, 498-500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

It cannot be doubted that features relating to general health and sanitation within Essex are of prime interest to inmates incarcerated there. Nor can there be any serious dispute that plaintiff inmates have a personal stake in the fire-worthiness of the structure in which they are housed. Defendant Hall inaptly construes the requirement of injury as requiring proof that the inmates inevitably will suffer physical injury or death from fire before they have standing to challenge the hazardous fire conditions which the district court found existing at Essex. We find this proposition to fall far below contemporary expectations of constitutionally-mandated humane treatment. One need not wait for the conflagration before concluding that a real and present threat exists.[4]

III.

We next examine whether the district court exceeded the scope of its discretion by ordering the closing of Essex if certain mandated corrections are not implemented. Federal courts have long exercised equity powers and in the key case of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), the Court highlighted the authority federal courts have when confronted with constitutional abridgements. "Once a right and a violation have been

[4] We note that evidence submitted to the district court showed that there had been a serious fire at Essex in February, 1975, which destroyed four cells, the floor, and electrical wiring. There was also affidavit testimony that inmates set small fires in the cells and that, at least upon one occasion, an inmate was so overcome by heat that he could not get by the fire to reach the escape door. He was trapped in the rear of the cell block until the fire was put out. As we noted, *supra* at 16, the district judge personally inspected Essex and concluded that it presented a serious fire hazard. Defendants have given us no basis for finding the court's conclusions to be clearly erroneous.

shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15, 91 S.Ct. at 1276. The district court properly recognized the delicate balance which must be maintained on two levels: as between the judiciary on the one hand and the legislative and executive on the other, and the special delicacy required in a federal system such as ours. We do not think that the court exceeded its equitable powers.

The changes ordered by the court were narrowly directed to the prime areas of concern. The court ordered specific fire safety measures;[5] glazing of windows with clear glass in lieu of the previous (frequently torn) opaque plastic covers; screens on windows in the kitchen; proper cleaning of food storage areas; enclosed toilet and sink for use by the inmates at the site of existing water and sewer lines. The court also ordered an increase in the Jail staff for the dual purpose of providing adequate fire prevention protection and of permitting pretrial detainees out-of-cell time substantially equivalent to that permitted inmates in the House of Correction (persons already convicted of a crime).

In reviewing the district court's order, we note several points. First, we understand from oral argument that those portions of the order which called for implementation

[5] We take this occasion to express our concern at counsel's inaccurate characterization of a case relied on in the brief. Specifically, we refer to defendant-appellant Hall's brief at 24, where counsel states that, although Judge Garrity found a fire hazard at the Charles Street Jail, *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676 (D. Mass. 1973), similar to that found by Judge Skinner at Essex, Judge Garrity, "refrained from ordering any changes." Counsel then states that this judicial "restraint exercised by Judge Garrity should properly have been exercised by Judge Skinner in the instant case. As counsel unmistakably knows, Judge Garrity ordered the Charles Street Jail closed because of the unconstitutional conditions he found there. To assert, as counsel does in his brief, that Judge Garrity found a fire hazard and did nothing about it, substantially understates Judge Garrity's remedial concerns.

by October 31, 1977, and December 31, 1977, have been effectuated. The only parts of the order outstanding require a second egress to be built, wooden stairs in the cell area to be replaced with noncombustible material, and installation of an electronic system for opening cell doors from a central location in case of fire. We leave undisturbed those parts of the order already implemented. Those which yet remain to be carried out are affirmed. This is not a case where the district court has substituted its own notions of what might be desirable in a corrections setting for that of the prison authorities. *Cf. Nadeau* v. *Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977). The court wisely did not unnecessarily intrude into provinces best left to administrative expertise. *See e.g., Jones* v. *N. C. Prisoners' Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Procunier* v. *Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *United States ex rel. Wolfish et al.* v. *Levi*, Nos. 77-2035 and 77-2135, 573 F.2d 118 (2d Cir. Jan. 24, 1978); *Newman* v. *State of Ala.*, 559 F.2d 283, 287 (5th Cir. 1977).

Faced with unconstitutional conditions, the court ordered that the facility be brought within constitutional parameters. The remedy does not exceed the constitutional violation. *See Milliken* v. *Bradley*, 418 U.S. 717, 744-745, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I*). The mandated changes are modest in nature, fair to the inmates, and not oppressive for the corrections authorities. We conclude that, on the facts of this case, the order of the district court is "reasonable, feasible and workable." *Swann* v. *Board of Education, supra*, 402 U.S. at 31, 91 S.Ct. 1267.

We do not understand defendant Hall's complaint to lie with the specifically mandated changes, but rather with the trump card held by the district court, namely, the threat of ordering Essex closed if the changes are not made. We find neither error nor abuse of discretion in the court's

action. A district court can order changes which will force the state to expend funds. *Milliken* v. *Bradley*, 433 U.S. 267, 288-291, 97 S.Ct. 2749 (1977) (*Milliken II*); *Edelman* v. *Jordan*, 415 U.S. 651, 667-668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Martinez Rodriguez* v. *Jimenez*, 537 F.2d 1 (1st Cir. 1976). If the legislature should balk at allocating funds for court ordered changes, an appropriate remedy for a court to choose, at least conflicting with principles of federalism and with the separation of powers, is to order the facility closed. *See Rhem* v. *Malcolm*, 507 F.2d 333, 339 (2d Cir. 1974); *Inmates of the Suffolk County Jail* v. *Kearney*, 573 F.2d 98 (1st Cir., March 17, 1978). As there has been admirable compliance with the district court order thus far, we are not confronted by an actual controversy concerning the closure order. Accordingly, we forebear consideration of what specific conditions might give rise to such an order. U.S. Const. art. III, § 2, cl. 1.

We briefly consider defendant Hall's assertion that the court should not have kept the closure of Essex as a possible remedy since a number of the inmates had indicated in a letter written to a local newspaper that they preferred Essex to a more distant facility. The fact that some inmates might prefer unconstitutional conditions in no manner lessens the district court's responsibility when confronted with a situation which offends the Constitution. *Swann* v. *Board of Education*, *supra*, 402 U.S. at 16, 91 S.Ct. 1267.

IV.

Finally, defendant argues that the district court should not have ordered that additional staff be hired. In issuing its order, the court stated that the additional staff could be used to increase fire protection and to afford more out-of-cell time to the detainees.

As noted in *Feeley* v. *Sampson*, 570 F.2d 364 at p. 369 (1st Cir. 1978), many courts have held that pretrial detainees are to be confined only to the degree necessary to

guarantee their presence at trial. *See Duran* v. *Elrod*, 542 F.2d 998 (7th Cir. 1976); *Rhem* v. *Malcolm*, *supra*, 507 F.2d at 336; *Inmates of the Suffolk County Jail* v. *Eisenstadt*, 360 F.Supp. 676, 685-688 (D. Mass. 1973). However, the district court's order in the present case may be affirmed even under less rigorous standards. "Restrictions upon detainees that serve no proper purpose, but merely reflect the lack of imagination or energy of local officials, are properly the subject of judicial correction." *Feeley* v. *Sampson*, *supra*, at 371. Here, the sheriff and jail officials indicated that they would be willing to grant more out-of-cell time to detainees presenting no special security problems if provided with additional supervisory staff. The court left it to the discretion of the sheriff how he might use these resources to arrange for additional out-of-cell time. Given the flexibility of these arrangements, we cannot say that the district court's requirement was, under all the circumstances, unreasonable. Nor can we find in the record that the state has articulated any constitutionally sufficient reason for withholding out-of-cell privileges to pretrial detainees substantially equivalent to those provided the convicts at Essex. Therefore, we find no error in the court's order to hire additional staff for the dual purpose to help alleviate the fire hazard at Essex and to maximize out-of-cell time for pretrial detainees.

The order of the district court is affirmed.

LEVIN H. CAMPBELL, *Circuit Judge* (concurring).

The district court's resolution recognizes that jail authorities are constitutionally bound to maintain a safe and humane environment, but at the same time reflects a proper sensitivity to the narrow role which a court should play in these matters. While I thus concur with my brethren in affirming the decision below, I wish to make it clear that I would not agree that merely because sentenced prisoners are given a certain amount of out-of-cell time, detainees are constitutionally required to receive the same. A mechanistic approach to constitutional analysis seems to me inappropriate. *See generally Feeley* v. *Sampson*, 570 F.2d 364 (1st Cir. 1978). There are plausible reasons why a short-term detainee might reasonably be subjected to greater limitations than those imposed upon a regular inmate. Some regular inmates, like those serving short sentences for misdemeanors, are not security risks. Detainees, on the other hand, are likely to be recidivists or persons charged with serious crimes. Furthermore, long-term sentenced prisoners are more obviously entitled to opportunities for exercise and recreation than persons being held for a few days or weeks. Thus I think the kind of simple comparison my brothers would make, while reasonable enough on occasion, is no substitute for a more comprehensive analysis.

In this case, however, the authorities principally concerned—the county commissioners and sheriff—have not seriously objected on security grounds, or even on grounds of expense, to the district court's order in regard to out-of-cell time, and I think it can be fairly assumed that the district court's determination rests on a reasonable and practical view of what can and should be done, in keeping with principles set forth in *Feeley*, rather than upon a mere mechanical comparison.

APPENDIX B

JAMES DiMARZO, ET AL.,
PLAINTIFFS,
v.
ROBERT E. CAHILL, ET AL.,
DEFENDANTS.

PRELIMINARY INJUNCTION
July 8, 1977

SKINNER, D.J.

This matter came on to be heard on the plaintiffs' motion for a preliminary injunction, which was consolidated with a hearing on the merits with respect to the specific matters described in the annexed Findings and Memorandum, and after consideration thereof, and in accordance with said Findings and Memorandum, it is ORDERED, ADJUDGED AND DECREED:

That the Essex County Jail and House of Correction at Salem be closed, and all the inmates thereof either removed or released unless:

1. By October 31, 1977, the following conditions shall have been met.
   a. The staff of the Jail shall have been sufficiently increased in the opinion of the Sheriff and Deputy Master to permit out-of-cell time for detainees, who are not special security risks, which is substantially equivalent to the out-of-cell time permitted inmates of the House of Correction; ***and***
   b. The staff of the institutions shall have been sufficiently increased to provide, in the opinion of the Sheriff and Deputy Master, adequate fire prevention, detection and super-

vision of the release of inmates in the event of fire; *and*

c. The institutions shall be equipped with adequate electronic smoke detectors and zone monitors connected to a central panel in the main office of the Jail, which shall be manned 24 hours a day; *and*

d. All of the cells in the institutions shall be furnished with fire retardant non-toxic mattresses; *and*

e. Two Scott air packs shall be available at all times in the institutions, and at least two members of the institutions' staff who have been trained in their use shall be on duty at all times, day and night; *and*

f. The institutions shall regularly hold fire drills at unannounced and random times, both day and night, not less than once a month; *and*

g. The Sheriff and the Deputy Master shall have instituted some control system to insure that every inmate is promptly issued the proper equipment for his cell, and that the sanitation rules of the institutions are scrupulously carried out, *and*

h. All windows shall have functioning frames and be glazed with clear glass; *and*

i. The window screens in kitchen and food storage areas shall have been cleaned.

2. By December 31, 1977,

a. An enclosed toilet and a sink shall have been installed at each present location of waste receptacles; i.e., at the site of existing sewer and water lines; *and*

b. Flame retardant paint shall have been applied to all wooden floors; *and*

c. An additional standpipe with hoses shall have been installed on the Jail side of the facility.

3. By June 6, 1978, a second egress shall have been constructed on the Jail side of the institution opening into a fenced yard, and all wooden stairs in the cell area replaced with stairs made of non-combustible material.

4. By December 31, 1978, an electric or electronic system shall have been installed whereby all of the cell doors can be opened simultaneously from a central location.

All plans for physical alterations to the institutions shall be promptly submitted to the plaintiffs' attorney at every stage, from preliminary plan to final plan, and upon motion, the court shall hold hearings on the sufficiency thereof.

Compliance with the above conditions shall be evidenced by sworn affidavits of the Sheriff and the Deputy Master filed on or before the day set for compliance in each case. Such affidavit shall be prima facie evidence of compliance, but on motion of the plaintiffs, the court will hold a hearing on the issue of compliance.

Conditions 2 through 4 above shall be deemed waived if on the date established for compliance all of the following events have occurred:

A. The County Commissioners have determined to build a new Jail and House of Correction; *and*

B. Funds for the construction thereof have been authorized and are actually available on hand; *and*

C. A site for the new Jail and House of Correction has been acquired and all local and state approval for such use thereof secured; *and*

D. Architectural and engineering plans have been prepared; *and*

E. A contract for the construction of the new Jail and House of Correction has been executed, which contract shall provide for a time within which the work is to be completed.

If the events described in paragraphs A through E shall have occurred, the order closing the Salem Jail and House of Correction shall be stayed a reasonable time to permit the completion of a new facility.

WALTER JAY SKINNER
United States District Judge

Civil Action
No. 77-939-S

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES DIMARZO, ET AL.,
Plaintiffs,
v.
ROBERT E. CAHILL, ET AL.,
Defendants.

FINDINGS OF FACT AND MEMORANDUM ON MOTION FOR PRELIMINARY INJUNCTION

July 8, 1977

SKINNER, D.J.

This complaint by inmates of the Essex County Jail and House of Correction at Salem seeks the amelioration of conditions at those institutions which are alleged to be in violation of the constitutional rights of the plaintiffs. Some of the plaintiffs are inmates of the Jail, that is, accused persons awaiting trial, and some are inmates of the House of Correction, that is, persons who are serving sentences after conviction of crime. Most of their complaints are common to the entire institution, but the Jail inmates have additional allegations of deprivation which will be dealt with separately. The matter is before me on the plaintiffs' motion for a preliminary injunction.

Testimony was offered on so much of the complaint as deals with toilet and washing facilities, sanitation in the preparation and storage of food, cell furnishings, food service to disciplinary and protective custody prisoners, fire hazard, lack of proper windows, and treatment afforded detainees in the Jail which is less favorable than that

afforded convicts in the House of Correction. I also took a view with counsel, the Sheriff, the Deputy Master, and the plaintiffs' expert witness on matters of sanitation and safety, who was an inspector of the Massachusetts Department of Health. There is little dispute over the facts. I find them to be as follows:

The building housing these two institutions was constructed in 1815, with an addition in 1884. The inmates are housed in a single wing. Down the center of the structure there are two rows of cells, back to back, each four tiers high. Access to each tier, except the ground floor tier, is by a catwalk. The cells open onto the catwalk. Between the catwalks and the outside wall of the building there is an open space which runs the full height of the structure. Light and air come in (in varying degrees) through windows in the outside walls. Many of these windows are without glass, covered with dirty plastic sheeting and dirty screens. My visit was in May, and the ventilation was not objectionable, but it is likely to be otherwise in winter. The Deputy Master testified that new windows and frames are presently being fabricated on the House of Correction side, and that the existing frames on the Jail side, which are considered sound, will be reglazed this summer.

The House of Correction houses approximately eighty-eight prisoners and the Jail approximately twenty-five detainees, all males in both institutions. There is but one flush toilet for all of these inmates. There is no plumbing whatsoever in the cells. Each inmate is supposed to have in his cell a two-quart plastic water pitcher, a plastic washbasin and a covered plastic bucket for excrement. Anyone using the plastic bucket in his cell is visible to persons on the catwalk. In the several double cells, there is no privacy whatsoever. There are three receptacles on the House of Correction side for the dumping of material from the plastic bucket and washbasin. These are connected to a

sewer line, and there is hot water available at these locations to clean the receptacles and the buckets. Cleaning agents and scrub brushes are provided. Jail inmates may cross over to the House of Correction for the purpose of using these facilities. Inmates of the two lower tiers of the House of Correction have direct access to the single flush toilet when they are not locked in their cells. Other inmates must be released from their cell blocks and escorted to the toilet. Requests to be released for this purpose are freely granted if a guard is available for the purpose.

There is no other plumbing in any of the cell blocks except for two sets of shower stalls, each with three shower heads. The Deputy Master testified, and I find, that the construction of the building is such that extension of water and sewer lines to each cell would not be feasible. Experiments with portable toilets were conducted in the past, but the results were unsatisfactory and the type used was removed at the request of the inmates. The Deputy Master has ordered several of a new type of portable toilet, which will be furnished to inmates on request on an experimental basis. The inmates should be informed by public posting of the availability of these devices.

Interior plumbing is certainly the norm of American life, even in prisons, and privacy in personal hygiene is generally equated with minimal human dignity. Although the staff and inmates appear to deal with the existing conditions remarkably well, every reasonable step should be taken to ameliorate them. It would be reasonably practical to install at least three more enclosed flush toilets and sinks at the sites of the dumping receptacles, where there are already water and sewer connections.

It is alleged, and on inspection I find, that new inmates in the Jail are not always issued the required pitcher and basin, towel, sheets and blankets as soon as they are admitted. The conditions are bad enough at best, and their

tenuous constitutional sufficiency is dependent upon meticulous compliance with the institutions' own rules. An order will enter requiring the Sheriff and Deputy Master to take steps to ensure that each inmate, particularly in the Jail, be issued the necessary equipment promptly upon admission.

There are various lapses from good practice and proper maintenance in the kitchen and food storage areas. One of the most notable was the lack of covering on the "dumpster" type garbage and trash receptacle stored just outside the kitchen. The Deputy Master informed me that this situation will be corrected by the contractor. There is an accumulation of decades of dirt hanging in streamers from the kitchen window screens. These must be cleaned, and I would suppose that an inmate work crew could accomplish this in a short time. The other failures to meet the standards of the Department of Health are relatively minor, and while they should as a matter of policy be corrected, they do not fall to the level of a constitutional violation warranting my intervention.

The plaintiffs make much of the fact that the House of Correction inmates are allowed out of their cells for fifteen hours a day, but that Jail inmates are allowed out of their cells only ten and one-half hours three days a week, seven and one-half hours for the alternating three days, and fifteen hours on Sunday. The Sheriff replies that Jail inmates present special problems of supervision. Some of them are awaiting trial on serious charges, such as armed robbery and murder, and represent greater security risks than do the sentenced prisoners. There is relatively rapid turnover in the Jail, and the staff does not get as much of a chance to evaluate the trustworthiness of the Jail inmates. Notwithstanding these stated problems, the Sheriff agrees that he would provide out-of-cell time for all the Jail inmates who were not demonstrable security risks equal to

that in the House of Correction if he had additional supervisory staff. Even seven and one-half hours time out of the cell is considerably more generous than the time allotted in the cases cited by plaintiffs. I am reluctant by rigid fiat to interfere with the exercise of the Sheriff's judgment in this respect, at least as a preliminary matter, and in view of the Sheriff's expressed intention, I will enter an order providing for additional staff in the expectation that he will make proper use of it.

The principal issue in this case, in my opinion, is the fire hazard at the Jail. The only exits from the cell blocks are through the central stairwell at the inside end of the wing of the building containing the cell tiers, and from the floor level of the House of Correction to the exercise yard. The floors of the catwalks are tongue-and-groove pine boarding covered with layers of old paint and, in some cases, flammable composition floor covering. In each cell there is either a flammable ticking mattress or a foam mattress which will give off highly toxic fumes if ignited. The inmates, particularly in the House of Correction, have equipped their cells with TV's, radios and stereo phonographs, and strung their cells with extension cords leading from the single light socket in each cell. The inmates commonly smoke cigarettes in the cells.

In the event of a fire, when the inmates were in their cells, each cell would have to be unlocked individually by members of the staff. With the reduced staff available at night, a considerable time would elapse before the inmates could be evacuated. There are two fire hoses located on the stairwell leading to the cell blocks. They are long enough to reach any part of the cell area. They would be of no assistance if there was fire or extensive smoke in the stairwell itself.

The parties all agree that a serious fire hazard to the inmates exists. I have not been cited to a case specifically

holding that subjecting jail inmates and convicts to excessive fire hazard is a violation of their constitutional rights, although the fire hazard is mentioned by Judge Garrity in the Charles Street Jail case, *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974). I have no doubt that as a matter of both the Eighth and the Fourteenth Amendments, the defendants have a duty to persons incarcerated against their will not to expose them to extraordinary risks of fire.

A question arises as to remedy. I called all the parties to confer with me concerning various steps which might be taken. There is general concurrence on interim procedures. The Commissioner of Correction takes the position, however, that no extensive investment, e.g., for electrically controlled cell doors which could be simultaneously opened from a control panel, should be made in what is basically a hopeless structure. He believes that there will be a new Jail and House of Correction in Essex County in the relatively near future. The Chairman of the County Commissioners is opposed to the construction of a new jail "at this time" because of the burden on the taxpayers. There have, in fact, been proposals made for a new Essex County Jail and House of Correction for at least thirty years, but they have all bogged down on the issues of location and expense. A request for the required legislative approval of electric doors was rejected.

It is this long continuing political stasis which brings this issue before a federal court, an institution singularly ill-suited to its resolution.

At issue in the case is effective definition and enforcement of those rights so extensively reviewed in *Inmates of Suffolk County Jail, supra; Rhem* v. *Malcolm*, 371 F. Supp. 594 (S.D. N.Y.), *aff'd and modified*, 507 F.2d 333 (2d Cir. 1974), and other cases cited by plaintiffs, particularly the rights of jail detainees who are still entitled to the presumption of innocence. Notwithstanding the general statements of principle in those cases, the restraint on a criminal defendant necessary to insure his presence at trial can not be practically freed from most of the manifestations of the same "punishment" as is imposed on convicts so long as such defendants are housed in jails. This limitation has been recognized by the courts, which in practice have implicitly recognized that the enforceable component of a detainee's Fourteenth Amendment right is the requirement that he be treated at least no worse than convicts who are housed in the same institution,* and further that he in no circumstances be subject to conditions which if imposed on convicts would violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Part of the problem is that the defendants in this case have no independent power to raise money, but must go to the General Court of the Commonwealth for approval of the county budget, or in the Commissioner's case, for appropriations. The members of the General Court, who control the purse strings, are not before the court.

Milliken v. *Bradley*, 45 U.S.L.W. 4873, 4879-80 (U.S. June 27, 1977), holds that the court may order remedies which will require the state to spend money. The case says nothing about the enforcement of the order particularly when the raising of funds may be frustrated by persons who are not parties to the suit. *Cf. Rhem* v. *Malcolm*, 507 F.2d 333, 341 (2d Cir. 1974).

One thing that I can order and enforce is the closing of the institutions. *Rhem* v. *Malcolm, supra.* This would result in considerable confusion and hardship, as indicated by a letter in evidence from many inmates, and very

*And to an extent not entirely clear, no worse than convicts in the same state correctional system. *Inmates of Suffolk County Jail, supra,* 688.

probably result in serious overcrowding in other institutions or the forced release of persons who should be in custody. The other Essex County Jail and House of Correction in Lawrence is already overcrowded. It would not be the end of the world, however, and if the defendants provide no other constitutional solution, I am prepared to do it.

It is of paramount importance that in the delicate task of intervening in the administration of state institutions, federal courts observe with rigorous precision the line between what is clearly desirable as a matter of common sense and policy, and what is constitutionally required.

While it appears to me that as a matter of common sense Essex County should have a new Jail and House of Correction rather than investing large sums in this ancient facility at Salem, I am also of the opinion that it is possible to bring the Salem facility up to constitutionally minimum standards. The establishment and maintenance of those standards are the limit of my concern. The choice of means is for the political governors of Essex County.

Since there appears little likelihood of additional evidence being offered on the merits on the aspects of the case discussed above, the hearing on the preliminary injunction, including the conference among the parties, counsel and the court, is hereby consolidated with the hearing on the merits, pursuant to Rule 65(a).

Accordingly, based on the recommendations of the parties with respect to fire protection, and upon the foregoing facts, I order a preliminary injunction to issue in the terms filed herewith.

s/WALTER JAY SKINNER
United States District Judge

APPENDIX C

Statutes

CHAPTER 125 — Correctional Institutions of the Commonwealth

§ 1. Definitions

As used in this chapter and elsewhere in the general laws, unless the context otherwise requires, the following words shall have the following meanings:

(*a*) "administrator", chief administrative officer of a county correctional facility;

(*b*) "commissioner", the commissioner of correction;

(*c*) "committed offender", a person convicted of a crime and committed, under sentence, to a correctional facility;

(*d*) "correctional facility", any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law;

(*e*) "correctional institution", correctional facility;

(*f*) "county correctional facility", any correctional facility owned, operated, administered or subject to the control of a county of the commonwealth;

(*g*) "department", the department of correction;

(*h*) "gainful employment", employment within or without any correctional facility including but not limited to labor for the operation and maintenance of any correctional facility;

(*i*) "inmate", a committed offender or such other person as is placed in custody in a correctional facility in accordance with law;

(*j*) "institution", facility;

(*k*) "penal institution", correctional facility;

(*l*) "prison", correctional facility;

(*m*) "prisoner", a committed offender and such other person as is placed in custody in a correctional facility in accordance with law;

(*n*) "state correctional facility", any correctional facility owned, operated, administered or subject to the control of the department of correction, including but not limited to: Massachusetts Correctional Institution, Walpole; Massachusetts Correctional Institution, Norfolk; Massachusetts Correctional Institution, Concord; Massachusetts Correctional Institution, Framingham; Massachusetts Correctional Institution, Bridgewater; Massachusetts Correctional Institution, Plymouth; Massachusetts Correctional Institution, Warwick; Massachusetts Correctional Institution, Monroe;

(*o*) "state prison", Massachusetts Correctional Institution, Walpole;

(*p*) "superintendent", the chief administrative officer of a state correctional facility.

CHAPTER 124

Powers and Duties of the Department of Correction

§ 1. Powers and duties of commissioner

In addition to exercising the powers and performing the duties which are otherwise given him by law, the commissioner of correction, in this chapter called the commissioner, shall:

(*a*) designate, establish, maintain, and administer such state correctional facilities as he deems necessary, and may discontinue the use of such state correctional facilities as he deems appropriate for such action; provided that no state or county correctional facility named in paragraph (*n*) of section one of chapter 125 shall be discontinued without specific authorization and approval of the General Court;

(*b*) maintain security, safety and order at all state correctional facilities, utilize the resources of the department to prevent escapes from any such facility, take all necessary precautions to prevent the occurrence or spread of any disorder, riot or insurrection at any such facility, including but not limited to the development, planning, and coordination of emergency riot procedures with the commissioner of public safety, and take suitable measures for the restoration of order;

(*c*) establish and enforce standards for all state correctional facilities;

(*d*) establish standards for all county correctional facilities and secure compliance with such standards, if necessary, through the enforcement provisions of section one B of chapter one hundred and twenty-seven;

(*e*) establish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department, designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the commonwealth;

(*f*) establish a system of classification of persons committed to the custody of the department for the purpose of developing a rehabilitation program for each such person;

(*g*) determine at the time of commitment, and from time to time thereafter, the custody requirements and program needs of each person committed to the custody of the department and assign or transfer such persons to appropriate facilities and programs;

(*h*) establish training programs for employees of the department and, by agreement, other corrections personnel;

(*i*) investigate grievances and inquire into alleged misconduct within state correctional facilities;

(*j*) maintain adequate records of persons committed to the custody of the department;

(*k*) establish and maintain programs of research, statistics and planning, and conduct studies relating to correctional programs and responsibilities of the department;

(*l*) utilize, as far as practicable, the services and resources of specialized community agencies and other local community groups in the rehabilitation of offenders, development of programs, recruitment of volunteers and dissemination of information regarding the work and needs of the department;

(*m*) make and enter any contracts and agreements necessary or incidental to the performance of the duties and execution of the powers of the department, including but not limited to contracts to render services to committed offenders, and to provide for training or education for correctional officers and staff;

(*n*) seek to develop civic interest in the work of the department and educate the public and advise the general court as to the needs and goals of the corrections process;

(*o*) expend annually in the exercise of his powers, performance of his duties and for the necessary operations of the department such sums as may be appropriated therefor by the general court;

(*p*) report annually to the secretary of human services, the governor and the general court;

(*q*) make and promulgate necessary rules and regulations incident to the exercise of his powers and the performance of his duties including but not limited to rules and regulations regarding nutrition, sanitation, safety, discipline, recreation, religious services, communication

and visiting privileges, classification, education, training, employment, care, and custody for all persons committed to correctional facilities.

CHAPTER 126

Jails, Houses of Correction and Reformation, and County Industrial Farms

INSPECTION OF PRISONS

§ 1. County commissioners; inspection of prisons; duties

The county commissioners shall be inspectors of the prisons in their counties. They shall twice in each year, at intervals of not exceeding eight months, themselves or by a committee of two of their members, visit all the prisons in their county, and fully examine into everything relative to the government, discipline and police thereof; and as soon as may be after each inspection, the committee shall make and subscribe a detailed report to the commissioners of the condition of each prison as to health, cleanliness and discipline at the time of inspection, the number of prisoners confined there within the preceding six months or since the last inspection, the causes of confinement, the number of prisoners usually confined in one room, the distinction, if any, usually observed in the treatment of the different classes of prisoners, the punishments inflicted, any evils or defects in the construction, discipline or management of such prisons, the names of prisoners who have been discharged or pardoned or who have died or escaped, and any violation or neglect of law relative to such prisons, with the causes, if known, of the violation or neglect.

§ 2. Exhibition of prison books, documents and accounts; examination of prison officers

When the commissioners or any of them visit any of said prisons, the sheriff, master, keeper or other officer in charge thereof shall admit them, when required, into every apartment of such prison, exhibit all books, precepts, documents, accounts and papers relative to the affairs of the prison or to the detention or confinement of any person therein, which may be required, and give such aid as they request in the performance of their duties. The commissioners or their committee may examine on oath, administered by one of them, either by written interrogatories, to be answered in writing and subscribed, or otherwise as they may direct, any officer, keeper or other person relative to the affairs or management of any prison, and they may also converse with any prisoner apart, and without the presence of any officer or keeper.

§ 11. Rules; examination of accounts; records

The county commissioners of the several counties and the penal institutions commissioner of Boston shall cause the rules established for the management of the house of correction and for the government of the prisoners therein to be strictly observed, shall examine all accounts of the master relative to the expenses of the institution, and keep a record of their official proceedings relative thereto.

JAILS, HOUSES OF CORRECTION, AND PRISONERS

§ 16. Custody and control of jails and houses of correction; jailer; assistants; bond

The sheriff shall have custody and control of the jails in his county, and except in Suffolk county, of the houses of correction therein, and of all prisoners committed thereto, and shall keep the same himself or by his deputy as jailer, master or keeper, and shall be responsible for them. The

jailer, master or keeper shall appoint subordinate assistants, employees and officers, and shall be responsible for them. In Suffolk county the penal institutions commissioner shall appoint a master of the house of correction, who shall hold office during the pleasure of said commissioner. A sheriff, who acts as jailer, master or keeper, or a jailer, master or keeper appointed by the sheriff, before entering upon the performance of his duties as such, and thereafter, at intervals of not more than one year, so long as he continues so to act or to hold such office, as the case may be, shall give to the state treasurer a bond, with such sureties as the superior court shall order and approve, conditioned faithfully to perform his duties.

TITLE VI
COUNTIES AND COUNTY OFFICERS

Chapter 34. Counties and County Commissioners

§ 3. Public buildings

Each county shall provide suitable court houses, jails, houses of correction, fire-proof offices and other public buildings necessary for its use, and suitable accommodations for district courts, except that the county of Dukes need not provide a house of correction and that Boston shall provide necessary public buildings for Suffolk county. No courtroom of the superior court shall contain a cage for defendants.

§ 14. Additional powers.

In addition to such powers and duties as may otherwise be conferred or imposed by law, the commissionrs may provide for erecting and repairing court houses, jails and other necessary public buildings within and for the use of their county, but no money shall be paid or liability incurred therefor in excess of the amount specifically authorized by the general court, except for emergency repairs, and no bills for construction or enlargement of a jail, house of

correction or reformatory shall be incurred or paid until the plans therefor have been approved by the commissioner of correction, except as otherwise provided. They shall have authority to represent their county, and to have the care of its property and the management of its business and affairs in cases where not otherwise expressly provided; to sell and convey any real estate of the county by deed, sealed with the county seal, signed and acknowledged by them, or to lease any real estate of the county; to adopt a county seal, which shall be in the custody of their clerk and affixed to all processes requiring it.

CHAPTER 127

DEFINITIONS

§ 1. Definitions

In this chapter "commissioner" shall mean the commissioner of correction. "Parole board" shall mean the parole board of the department of correction.

§ 1A. County correctional facilities; minimum standards; establishment and revision; financial or other assistance

In accordance with paragraphs (*d*) and (*q*) of section one of chapter one hundred and twenty-four the commissioner shall establish, and shall from time to time revise, minimum standards for the care and custody of all persons committed to county correctional facilities. Prior to establishing or revising such minimum standards the commissioner shall visit, consult with and receive the recommendations of the sheriffs of the several counties and the penal institutions commissioner of the city of Boston. The commissioner shall require from the sheriffs of the several counties and the penal institutions commissioner of the

city of Boston periodic reports on the population, operation and conditions of all county correctional facilities.

The commissioner may provide consultation services for the design and construction of facilities, studies and surveys of programs and administration and any other technical assistance he deems proper and necessary. In cooperation with the county commissioners and administrators of each county, the commissioner may develop and administer programs of grants-in-aid or subsidies for any county correctional facility.

§ 1B. Inspection of county correctional facilities; compliance with minimum standards; report; notice of violations; enforcement procedure

At least once each six months the commissioner or his delegate shall inspect each county correctional facility to determine compliance with minimum standards. The results of such inspections shall be summarized in the annual report of the commissioner to the general court. Personnel of the department shall be admitted to all county correctional facilities as required for the purposes of this section.

If, in the opinion of the commissioner, any county correctional facility does not comply with the standards established by him for county correctional facilities, the commissioner shall give notice of the alleged violation to the sheriff and the county commissioners of the county in which such facility is located except that in the case of Suffolk County House of Correction such notice shall be given to the penal institutions commissioner of the city of Boston. Said notice shall specify the particular standards that in the commissioner's opinion have not been met by such facility. The officials so notified shall have the right to be heard by the commissioner with regard to the alleged violation and shall have a reasonable period of time to remedy any such violation. If, in the opinion of the commissioner, the facility has not been brought into compli-

ance with the aforesaid standards within a reasonable time from the date when notice of their violation is given, the commissioner may petition the Superior Court in equity in the county in which such facility is located for an order to close the facility or for other appropriate relief. The Superior Court shall have jurisdiction to enter such an order.

Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-176.

FRANK A. HALL,
PETITIONER,
v.
JAMES DiMARZO ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

Of Counsel:
ALVIN J. BRONSTEIN,
National Prison Project
of the American Civil
Liberties Union
Foundation,
1346 Connecticut Avenue, N.W.,
Washington, D.C. 20036.
(202) 331-0500

ERNEST WINSOR,
Massachusetts Law Reform Institute,
2 Park Square,
Boston, Massachusetts 02116.
(617) 482-0890

On the Brief:
DALE S. DOENGES.

SUSAN E. T. STUDLIEN,
Massachusetts Civil Liberties
Union Foundation,
68 Devonshire Street,
Boston, Massachusetts 02109.
(617) 742-8020

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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Brief of Respondents in Opposition.

Opinions Below.

The respondents accept the statement of the petitioner.

Jurisdiction.

The respondents accept the statement of the petitioner.

Questions Presented.

1. Should this Court grant certiorari to review the question whether the petitioner, a state commissioner of correction who is required by Massachusetts law to inspect all county institutions in the state at least semi-annually, to issue minimum standards of care and custody for all persons confined thereto, and to seek compliance with these standards pursuant to specific statutory enforcement procedures, is a proper defendant in this case challenging conditions and practices in one of those county institutions?

2. Should this Court grant certiorari to review the question whether the courts below erred in their decisions concerning fire safety and out-of-cell time, when those decisions remedied constitutional violations which were conceded by Essex officials, which the courts below found served no legitimate purpose, and which Essex officials expressed a willingness to remedy?

Statement of the Case.

A. Prior Proceedings.

This case was filed in the district court as a class action on behalf of all persons who are or will be inmates at the Essex County Jail and House of Correction in Salem, Massachusetts [hereafter Essex]. The inmates brought suit pursuant to 42 U.S.C. §1983, seeking declaratory and injunctive relief against numerous unconstitutional conditions and practices. Named as defendants in the case were the Essex county commissioners, sheriff and deputy master of the institution, and the petitioner, the Massachusetts commissioner of correction. In a motion for a preliminary injunction, the plaintiffs requested equitable relief against specific constitutional violations in the

areas of fire safety, health, sanitation and out-of-cell time for persons awaiting trial (A-2).[1] After a hearing and a personal tour and examination of Essex, the district judge found the institution to fall below minimum constitutional standards.

The district court issued a modest injunction directing certain changes to bring Essex within constitutional bounds. Specific fire safety measures and improvements in sanitation were ordered (A-14-15). Windows were ordered framed and glazed with clear glass (A-14). An increase in staff was mandated both for fire safety and to allow detainees substantially the same time out of their cells as sentenced prisoners (A-13).

The petitioner did not request a stay of the district court's order, but appealed certain provisions of that order to the court of appeals.[2] In addition, he challenged the failure of the district court to grant his motion to dismiss. The defendant sheriff and deputy master joined the petitioner in his appeal, but filed no brief in the court of appeals. 575 F.2d 15, 16 (A-2).

In an opinion without dissent, the court of appeals affirmed the district court's order in its entirety. 575 F.2d at 20 (A-11). The court of appeals also found the petitioner a proper defendant because of his six-year-old legislative mandate to establish and enforce minimum standards of confinement for all Massachusetts county institutions, including Essex, and his failure to comply with this mandate. 575 F.2d at 17-18 (A-6).

The petition for a writ of certiorari is not joined by the defendant county commissioners, sheriff or deputy master. The petitioner's motion to the court of appeals for a stay of the injunction was denied.

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[1] References preceded by "A-" are to the appendices to the petition for a writ of certiorari.

[2] Indeed, as noted by the court of appeals, 575 F.2d at 16, 19, 20 (A-2, 8-9, 10), many of the changes ordered by the district court have already been effectuated by the defendant county commissioners, sheriff and deputy master.

B. Factual Background.

The building that comprises the Essex County Jail and House of Correction was constructed in 1815 with an addition in 1884. It houses approximately 88 sentenced prisoners and 25 persons awaiting trial (A-18). In the center of the structure are two rows of cells, back to back, each four tiers high (A-18). Four of the tiers comprise the jail for detainees, the other four the house of correction, where convicts are located. Access to each tier, except the ground floor tier, is by a catwalk (A-18). The cells open out onto the catwalk. Between the catwalks and the outside wall of the building is an open space which runs the full height of the building. The district court found that many of the windows, located in the outside walls, were without glass, covered with dirty plastic sheeting and dirty screens (A-18). Such conditions drastically reduce the amount of sunshine in the cells. 575 F.2d at 16 (A-3).

None of the cells at Essex has either a toilet or running water (A-19). Theoretically, inmates are provided with a two-quart plastic pitcher for water, a plastic wash-basin and a covered plastic bucket for bodily wastes. The district court found, however, that persons are not always issued even these items at the time they are admitted to the facility (A-18, 19). Anyone using the plastic bucket in his cell is visible to persons on the catwalk (A-18). In addition, the district court found that there were several double cells in use, in which there was no privacy whatever (A-18). The three receptacles into which the contents of the plastic buckets may be emptied are all located in the house of correction, and jail inmates must cross over to the house of correction to use them (A-18-19). Only one flush toilet and two sets of shower stalls, each with three shower heads, existed for the entire inmate population (A-18, 19). Certain of the inmates had direct access to the single flush toilet when they were not locked in their cells, but others

were wholly dependent upon the guards to release them from their cell blocks to use the toilet (A-19).

None of the defendants disputed, and the district court found, that all inmates at Essex were subjected to life-threatening fire hazards (A-21). The facility had only two exits, one through the central stairwell and one from the floor level into the exercise yard (A-21). The wooden floors were covered with layers of old paint and, in some cases, flammable floor covering (A-21). Mattresses were either flammable or composed of foam which would exude toxic fumes when ignited (A-21). In addition, the inmates' cells contained a variety of electrical equipment wired from the single light socket in each cell (A-21). All cells must be unlocked individually (A-21). The two existing fire hoses would be useless if there were a fire or extensive smoke in the stairwell (A-21). Evidence submitted to the district court showed that there had been a serious fire at Essex in February, 1975, which destroyed four cells, the foor, and electrical wiring. 575 F.2d at 18 n.4 (A-7 n.4).

Living conditions in the house of correction for sentenced prisoners were largely the same as those in the jail. But the district court found that persons awaiting trial in the jail were locked in their cells, without minimal sanitary facilities, for substantially longer hours than sentenced inmates in the house of correction (A-20). On the issue of lock-in time for detainees, the defendant sheriff asserted that he would willingly provide more out-of-cell time for detainees who were not demonstrable security risks if he had additional supervisory staff (A-20-21).

Reasons for Denying the Petition for a Writ of Certiorari.

A. The Massachusetts Commissioner of Correction is a Proper Defendant in This Case, and the Courts Below Correctly Refused to Grant his Motion to Dismiss.

Since 1972, the Massachusetts commissioner of correction has had a specific and detailed legislative mandate to establish and enforce minimum standards of care and custody for all persons confined in county jails and houses of correction throughout the state. Mass. Gen. Laws c. 127, §§1A, 1B (A-32-34). Since 1972, the Massachusetts legislature has required him to publish rules regarding virtually every facet of life in county facilities, including sanitation and safety. Mass. Gen. Laws c. 124, §1(q) (A-28). See also Mass. Gen. Laws c. 124, §1(d) (A-27). He has a duty to inspect each county institution at least every six months, and county officials must report annually to him. Mass. Gen. Laws c. 127, §§1B, 10 (A-33-34) (AR-1).[3] He is further authorized to furnish consultation services, technical assistance and grants-in-aid to county facilities. Mass. Gen. Laws c. 127, §1A (A-32-33).

At the time this case was heard in the district court and court of appeals, the commissioner had acted in continuous violation of his statutory mandate for over five years. Since 1972, he had not voluntarily promulgated any standards.[4]

[3]References preceded by "AR-" are to the appendices to this brief.

[4]Pursuant to an order of the Massachusetts Supreme Judicial Court, the commissioner had issued emergency regulations regarding discipline and classification in county facilities on August 8, 1977. *Maness et al.* v. *Snow et al.*, No. 226 Civ. (Supreme Judicial Court, June 20, 1977) (AR-2-9). On May 3, 1978, the day following the decision of the court of appeals in the instant case, Hall approved general standards for county correctional facilities. These were promulgated on May 11, 1978. 106 Mass. Register 19-99 (May 11, 1978). Not presently before this Court is the question of the constitutionality of these standards.

The plaintiffs asserted that this dereliction of his clear statutory duty made Hall at least in part responsible for the unconstitutional conditions of their confinement. The court of appeals, noting the commissioner's detailed state law obligations, said that ". . . the Commissioner of Correction has statutory responsibility over precisely the conditions giving rise to the violations." 575 F.2d at 17 (A-5). The court squarely rejected Hall's assertion that he was absolved of liability under 42 U.S.C. §1983 because he had not personally brought about the constitutional violations at Essex, but rather had failed to correct them. *Id.* It is settled law that the Civil Rights Act of 1871 was intended to safeguard against constitutional violations resulting from the dereliction of a statutory duty by a state official as well as to correct those resulting from more affirmative action. *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961). See also *Sims* v. *Adams*, 537 F.2d 829, 831 (5th Cir. 1976) (a supervisory defendant is subject to §1983 liability when he breaches a duty imposed by state or local law and this breach causes the plaintiffs' constitutional injury); *Miller* v. *Carson*, 563 F.2d 757, 761 n.8 (5th Cir. 1977) (that the abuse of authority alleged is a dereliction of duty under state law rather than an affirmative act makes no difference in determining liability under §1983).

As the court of appeals recognized, 575 F.2d at 17-18 (A-5-6), *Rizzo* v. *Goode*, 423 U.S. 362 (1976), cited by the petitioner in his brief at 4, 8-15, is wholly inapposite to the instant case. The court noted in its citation of cases at 575 F.2d at 17 n.2 (A-5 n.2) that post-*Rizzo* courts have consistently found supervisory personnel in positions similar to Hall's to be proper party defendants. As the petitioner concedes in his brief at 13, only two post-*Rizzo* courts of appeals, including

the court in the instant case, and two district courts have even considered the issue of liability of state correctional officials for constitutional violations in county facilities. Contrary to his assertion, these cases were all decided on the not merely consistent but identical theory that the officials' failure to comply with a specific statutory duty was causally related to the constitutional violations alleged. *DiMarzo* v. *Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (A-5-6); *Miller* v. *Carson*, 563 F.2d 757, 760-761 (5th Cir. 1977); *Lucas* v. *Wasser*, 425 F.Supp. 955, 961-962 (S.D.N.Y. 1976); *Adams* v. *Mathis*, ___ F.Supp. ___ (M.D. Ala. 74-70-S, 2/28/78, slip. op. at 5-6).[5] Compare *Kostka* v. *Hogg*, 560 F.2d 37, 40 n.1 (1st Cir. 1977), where, as the court of appeals noted, 575 F.2d at 18 (A-6), the theory of liability was respondeat superior, not statutory obligation. The dissent from a denial of certiorari in *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), adds nothing to Hall's argument. In *Lewis*, the district court had found that ". . . any link between responsible officials and the incidents of abuse is necessarily more attenuated here than in *Rizzo*." 554 F.2d at 101.

The commissioner's implication in his brief at 10 n.4 that he has only general supervisory authority over county institutions, or perhaps none at all, ignores the plain wording of his 1972 legislative mandate. Pre-1972 Massachusetts law required only that "[the commissioner of correction] shall have general supervision of jails and houses of correction." 1955 Mass. Acts c. 770, §7. In contrast, the 1972 legislation required him to accomplish numerous specific acts or to see that they were accomplished. Mass. Gen. Laws c. 124, §§1(d), 1(q) (A-27-28); c. 127, §§1A, 1B (A-32-34). Unlike *Rizzo* v.

[5]The fact that these courts use different words to articulate the same theory of law hardly indicates that their decisions are inconsistent, as the petitioner purports to believe in his brief at 13.

Goode, supra at 376-377, there is no dispute in this case that conditions at Essex violated the Constitution. Unlike the supervisory defendants in *Rizzo, supra*, at 375-377, Hall clearly knew or should have known about these conditions, and he had the power and the responsibility to correct them. "We are not confronted with sporadic incidents, over which the Commmissioner might properly claim to have no knowledge or control. Rather, we are dealing with the pervasive failure of responsible authorities to maintain Essex in conformity with constitutional requisites." 575 F.2d at 17-18 (A-5). Unlike *Rizzo, supra*, at 375-377, there is no dispute whatever in this case that Hall has failed to comply with his legal obligations. 575 F.2d at 18 (A-6). The causal link between Hall's refusal to obey state law and the injuries alleged by the plaintiffs and found by the district court in this case is clear.

> Hall is a proper defendant because of his *own* statutory duty and subsequent failure to act (and the consequent constitutional injury) and not on the basis of the act of others. [Emphasis in original.] 575 F.2d at 18 (A-6).

The petitioner suggests in his brief at 8 and 12 that the court of appeals' decision will force a restructuring of relationships between state and county correctional officials. To the contrary, it was Hall's own refusal to comply with his clear state law obligations that necessitated the court of appeals' decision. The structure of relationships between Massachusetts state and county correctional authorities is clearly delineated in a detailed legislative scheme.[6] The petitioner's role in that struc-

[6]The legislative scheme which details the structure of relationships between state and county correctional officials may be found in Mass. Gen. Laws c. 34, §§3, 14 (A-31-32); c. 124, §1 (A-26-29); c. 125, §1 (A-25-26); c. 126, §§1, 2, 11, 16 (A-29-31); c. 127, §§1, 1A, 1B (A-32-34), 10, 97 (AR-1).

ture is set forth with specificity in his 1972 legislative mandate. The court of appeals merely held that Hall could not demonstrate deliberate indifference to his statutory mandate for over five years and be held blameless for the consequences. *Cf. Milliken* v. *Bradley*, 418 U.S. 717, 746-748 (1974) (*Milliken I*); *Milliken* v. *Bradley*, 433 U.S. 267, 289-290 (1977) (*Milliken II*). Both the district court (A-22-24), and the court of appeals, 575 F.2d at 18-21 (A-7-10, 12), carefully considered federalism concerns in the instant case. Their remedy was tailored to correct only the unconstitutional conditions and practices found by the district court. Compare *Rizzo* v. *Goode*, *supra*, at 378-380. If the commissioner finds his official position a difficult one, as he complains in his brief at 8 and 12, that difficulty was created by his own disregard of the Massachusetts legislature's mandate, not by the federal courts.

Since the court of appeals merely held that the commissioner could not ignore a specific, detailed legislative mandate concerning county facilities for over five years and be absolved of responsibility for the consequences, there are clearly no special and important reasons to grant a writ of certiorari to review the question whether the petitioner is a proper party defendant in this case. Supreme Court Rule 19(1).

B. The Decisions of the Courts Below Concerning Fire Safety and Out-of-Cell Time Remedied Constitutional Violations which were Conceded by Essex Officials, which the Lower Courts Found Served No Legitimate Purpose, and which Essex Officials Expressed a Willingness to Remedy.

The petitioner so inaccurately describes the court of appeals' decision in his brief at 14-17 that the second question he presents for review not only suggests no special and important

reasons to grant a writ of certiorari; it is a question that is not even properly presented to this Court. See Supreme Court Rule 19(1).

The petitioner suggests that the court of appeals employed an equal protection standard of strict scrutiny in its approval of the hiring of additional staff at Essex to alleviate the concededly serious fire hazards and to provide more out-of-cell time for detainees. This suggestion ignores the plain wording of the court's holding on this issue:

> . . . many courts have held that pretrial detainees are to be confined only to the degree necessary to guarantee their presence at trial. [Citations omitted.] However, *the district court's order in the present case may be affirmed under even less rigorous standards.* "Restrictions upon detainees that serve no proper purpose, but merely reflect the lack of imagination or energy of local officials, are properly the subject of judicial correction." *Feeley* v. *Sampson* [570 F.2d 364 (1st Cir. 1978)] at 371. [Emphasis added.] 575 F.2d at 20 (A-10-11).

The court noted that the sheriff and jail officials, who are not parties to this petition for a writ of certiorari, had indicated a willingness to allow more out-of-cell time for detainees if provided with additional supervisory staff, and that the district judge had left it to the sheriff's discretion how to use the additional resources to provide more out-of-cell time. 575 F.2d at 20 (A-11). "Given the flexibility of these arrangements, we cannot say that the district court's requirement was, under all the circumstances, unreasonable." *Id.* In affirming the district court's order for increased staff to alleviate life-threatening fire hazards not disputed by any of the defendants and to provide more out-of-cell time for detainees, the court of

appeals thus relied, not on a mechanistic approach, but on the fact that Essex officials were willing to provide more out-of-cell time if they had more staff.

The petitioner erroneously states in his brief at 15 that Circuit Judge Campbell disagreed with the standard employed by the court of appeals in its holding on lock-in time, considering it inappropriately "mechanistic." In fact, Judge Campbell noted in his concurrence that he "would not agree" if the district court or court of appeals had employed a different standard in deciding the issue of lock-in time, not that he did not agree with the standard actually used. 575 F.2d at 20 (A-12). He too noted that "the authorities principally concerned — the county commissioners and sheriff — have not seriously objected on security grounds, or even on grounds of expense, to the district court's order." *Id.* He specifically stated:

> . . . I think it can be fairly assumed that the district court's determination rests on a reasonable and practical view of what can and should be done, in keeping with principles set forth in *Feeley, rather than upon a mere mechanical comparison.* [Emphasis added.] 575 F.2d at 21 (A-12).

The commissioner alone, not the "authorities principally concerned," 575 F.2d at 21 (A-12), with implementation of the district court's order, seeks review of an issue not properly presented to this Court.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

ALVIN J. BRONSTEIN,
National Prison Project of the
American Civil Liberties
Union Foundation,
1346 Connecticut Avenue, N.W.,
Washington, D.C. 20036.
(202) 331-0500

SUSAN E. T. STUDLIEN,
Massachusetts Civil Liberties
Union Foundation,
68 Devonshire Street,
Boston, Massachusetts 02109.
(617) 742-8020

ERNEST WINSOR,
Massachusetts Law Reform
Institute,
2 Park Square,
Boston, Massachusetts 02116.
(617) 483-0890

On the brief:
DALE S. DOENGES.

Appendix A.

MASSACHUSETTS GENERAL LAWS.

TITLE XVIII.

PRISONS, IMPRISONMENT, PAROLES AND PARDONS.

Chapter 127: Officers and Inmates of Penal and Reformatory Institutions; Paroles and Pardons.

§10. [Annual Reports of Sheriff, County Commissioners, etc.]

Annually, on or before August fifteenth, the sheriffs, county commissioners and the penal institutions commissioner of Boston, shall make a report to the commissioner of the salaries of prison officers, of the number and cost of support of prisoners, and of such other details relative to the management and discipline of the several prisons as the commissioner may prescribe.

§97. [Transfers from and to Correctional Institutions, etc.]

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-226 CIV.

ROBERT MANESS ET ALS

vs.

MASTER OF THE PLYMOUTH COUNTY
JAIL AND HOUSE OF CORRECTION
(LINWOOD H. SNOW) ET ALS

Order.

This matter came on to be heard and was argued by counsel, and, as provided in a memorandum filed this day, it is hereby ORDERED that the Commissioner of Correction promulgate rules and regulations concerning "discipline" and "classification" of inmates of county correctional facilities on or before August 8, 1977, and that, if no such regulations are promulgated by that date, those relevant procedures applicable to inmates of State correctional institutions shall be followed by the county defendants as to all persons then held in 23 hour a day lock-up and as to all persons thereafter proposed to be placed in 23 hour a day lock-up.

By the Court, (Wilkins, J.)

JOHN E. POWERS,
Clerk.

Entered: June 20, 1977

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-226 CIV.

ROBERT MANESS ET ALS

vs.

MASTER OF THE PLYMOUTH COUNTY
JAIL AND HOUSE OF CORRECTION
(LINWOOD H. SNOW) ET ALS

Memorandum Concerning the Plaintiffs' Application for a Preliminary Injunction.

The plaintiffs are inmates of a correction facility operated and maintained by the County of Plymouth. Each plaintiff has been placed in a 23 hour a day lock-up. Each, respectively, was placed in special confinement on January 4, 1977, March 31, 1977, and April 28, 1977. An agreement as to certain facts, entered into by the plaintiffs and the county defendants, indicates that the plaintiffs are confined to their cells for 23 hours a day; that one at a time each is allowed out of his cell for one hour each day during which he can move along a 100' by 4' catwalk. The plaintiffs have certain restrictions on extra food which are not applicable to other inmates. They are less likely to receive furloughs than inmates in the general population at the county facility. Inmates in the general population are allowed out of their cells for 9-1/2 hours per day and have access to certain recreational facilities. The plaintiffs were told on an informal basis why they were placed in 23 hour a day lock-up. They have not been told how long their special confinement will continue. None was given a hearing, af-

forded counsel, or given an opportunity to confront or cross-examine any accuser prior to his special confinement.

The plaintiffs object to the failure of the county defendants to extend to them certain procedural rights to which they claim they were entitled before they may lawfully be placed in special confinement. They also argue that the defendant Commissioner of Correction (Commissioner) has failed to comply with a statutory requirement that he issue rules and regulations concerning (among other things) "discipline" and "classification" of county inmates. The plaintiffs seek a preliminary injunction directing (1) their release until they are afforded their minimum due process rights, (2) the issuance of county regulations by the Commissioner according to a strict timetable, and (3) the application of the state prison regulations concerning "discipline," "departmental segregation," and "Administrative reclassification" until such time as the county regulations are issued and in effect.

General Laws, c. 124, §1(q), obligates the Commissioner to make and promulgate necessary rules and regulations regarding "discipline" and "classification" for all persons committed to all correctional facilities in the Commonwealth. The Commissioner concedes an obligation to make rules and regulations governing county correctional facilities. In his brief, he refers to such rules and regulations, now in the process of development, as "Minimum Standards for County Correctional Facilities." He expresses an intention to issue those standards in the next four months. However, he is opposed to making a current draft of those regulations available to the court unless they are impounded and is opposed to making them available to counsel for the plaintiffs unless they agree to restrict their use and dissemination. In view of the fact that counsel for the Commissioner contemplates public release and public hearings on the proposed regulations within the next four months, it is hard to understand the Commissioner's reluctance to present

an unrestricted copy of the current draft (in spite of his counsel's statement in open court that a copy would be presented), at least as to matters of "classification" and "discipline". At this time, there is no indication whether the regulations will prescribe any procedures (written reasons, hearings, etc.) concerning circumstances in which county inmates are placed in 23 hour a day lock-up.

The Commissioner argues that the plaintiffs have not been harmed because they cannot show that they have been hurt as a result of the Commissioner's failure to promulgate regulations. Of course, it is true that the plaintiffs cannot demonstrate they have been harmed by the absence of regulations unless those regulations will contain provisions setting forth procedures which must be followed in the process of placing persons such as the plaintiffs in 23 hour a day lock-up. The issue is not whether the plaintiffs should be in 23 hour a day lock-up but whether certain procedures should have been followed as a part of the process by which they were placed in the 23 hour a day lock-up. The county defendants have agreed that each plaintiff received only an informal oral statement of the reason for his special confinement or that the reason for the confinement was obvious in the circumstances. Counsel for the county defendants represented that the plaintiffs were entitled to nothing further because the authorities may change the nature of the plaintiffs' confinement in their unfettered discretion. The Commissioner's counsel has taken substantially the same view.

If, of course, the plaintiffs are entitled to more procedurally, the regulations should deal with those additional rights and the plaintiffs may have been harmed by the unavailability of those additional procedures.[1] The Commissioner's brief

[1] They would be harmed if, as a result of such procedures, their special confinement would never have commenced or would now have been termin-

argues that the regulations would not have to contain any procedures which are constitutionally mandated. This is a surprising suggestion. Minimum standards to be followed surely must be standards at or above the level of constitutional requirements. Any regulations which failed to expound any statutory and constitutional requirements concerning discipline and classification would hardly fulfil the statutory mandate that the Commissioner issue "necessary rules and regulations." Of course, the extent of any constitutional rights (and perhaps statutory rights) may be difficult to determine, but it is better that the Commissioner undertake such an attempt than to leave the matter to officials in each county.

Although the plaintiffs have not demonstrated that they are sustaining irreparable harm because of the absence of any regulations, the Commissioner concedes that he has a duty to issue regulations. In this aspect of the case, the Commissioner has granted that the plaintiffs are entitled to relief but argues that his proposed four months implementation procedure for his regulations should be allowed to stand. In view of the mandate to issue such regulations which has been in effect since 1972, a more expeditious process would appear warranted, at least as to "discipline" and "classification" regulations. In this respect, the case is appropriate for the entry of an interlocutory order finally dispositive of this aspect of the case. Such an order will be entered directing that the Commissioner promulgate rules and regulations concerning "discipline" and "classification" of inmates of county correctional facilities on or before August 8, 1977, and that, if no such regulations are promulgated by that date, those relevant procedures applicable to inmates of State correctional institu-

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ated. On the record now before the Court, it is not possible to determine whether any plaintiff has in fact been harmed by the absence of regulations prescribing procedures.

tions shall be followed by the county defendants as to all persons then held in 23 hour a day lock-up and as to all persons thereafter proposed to be placed in 23 hour a day lock-up.

The question then remains whether the plaintiffs are entitled to preliminary injunctive relief against the county defendants. The plaintiffs argue that they should be released from 23 hour a day lock-up until they are afforded their minimum due process rights. At the most, the plaintiffs would be entitled to the application of due process procedures and not automatic release. A principal consideration is whether the plaintiffs have any statutory or constitutional right to notice, a hearing, a written decision, confrontation, cross-examination, and similar items which, in various contexts, have been grouped under the general heading of procedural due process. Under the Federal Constitution it seems clear that the plaintiffs have no due process rights unless a state statute (or regulation) creates a liberty interest. *Meachum* v. *Fano*, 427 U. S. 215, 228-229 (1976). The Supreme Court has interpreted *Meachum* v. *Fano*, *supra*, as holding "that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976).

The plaintiffs cite G. L. c. 127, §41, in support of their claim. Section 41 is concerned with county facilities and the use of isolation units. Certain cells may be "used as isolation units, and for the enforcement of discipline." It is unclear from the statutory language whether such cells may be used only for discipline or whether they may be used, for example, to protect an inmate or to protect others from him. If such a cell is used for discipline, it should not be used "for more than

ten days for any one offence." The defendants argue that 23 hour a day lock-up is not confinement in an isolation unit within the meaning of §41. Certainly the plaintiffs are not totally isolated and have substantially greater privileges than minimally mandated by the last paragraph of §41. The defendants argue in effect that "isolation" in §41 means "solitary confinement" and that clearly the plaintiffs are not being held in solitary confinement. On this preliminary record, the plaintiffs have not established that §41 applies to their circumstances. Moreover, there has been no showing that, if §41 applies to them, the plaintiffs have any right or expectation under §41 that they will not be placed in isolation units. Their claim is that they are entitled to certain precedent due process procedures. Section 41 creates rights and expectations concerning the conditions in isolation units, and it provides that one may not be held there for disciplinary reasons for more than ten days. Thus, §41 provides rights and expectations only concerning conditions in isolation units and concerning the duration of disciplinary confinement, but none concerning transfer to an isolation unit. The plaintiffs have not established that they have any present statutory right to procedural due process before or as part of their being placed in 23 hour a day lock-up.

The plaintiffs have not established that separate procedures for state and county prisoners are without a rational basis. Their equal protection of the laws argument is without merit at this stage of the proceeding. Whether they can show in time that the distinction is without a rational basis remains to be seen.

There is no suggestion that the full bench of the Supreme Judicial Court will take a stricter view than the Supreme Court of the United States of the rights of prisoners, by reaching different conclusions concerning parallel provisions of the Constitution of the Commonwealth. See *Commonwealth* v. *Boyd*,

Mass. Adv. Sh. (1975) 687, 693-694. At this preliminary stage, I decline to impose a stricter standard on the defendants than that imposed by the Constitution of the United States. I conclude that the plaintiffs are not entitled to preliminary relief against the county defendants at this time. This conclusion should not be regarded as a judicial endorsement of the procedures (or lack of procedures) followed by the county defendants. I simply conclude that, at this time, it has not been demonstrated that the plaintiffs are entitled to injunctive relief against the county defendants.

When the Commissioner's regulations are issued, the situation may change. The Commissioner will have to consider carefully any attempt to make his long-delayed regulations concerning "discipline" and "classification" applicable only prospectively. When is ed, those regulations may well apply, and have to apply, to persons such as the plaintiffs.

HERBERT P. WILKINS,
Associate Justice.

June 20, 1977